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IN THE

Supreme Court of the United States

October Term, 1952.

No. 626.

IONE S. WYNNE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF.

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IONE S. WYNNE,

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COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari be issued to the Court of Appeals for the Second Circuit to review the judgment of that Court.

Statement of Matter Involved.

By this petition review is sought of a decision of the Court of Appeals disallowing a tax deduction claimed by the petitioner in 1945 on account of a casualty loss alleged to have been sustained in that year resulting from abnormal and heavy usage to which her yacht, loaned to

the United States Coast Guard for wartime service, had been subjected.

The vessel was operated by the Coast Guard for offshore patrol work during the years 1942-1944, and was returned to the petitioner in July 1944, at which time the Coast Guard also paid the petitioner $2,301.33 as the estimated cost of the repairs necessary to place the vessel in a satisfactory condition for return to her.

Upon learning from insurance underwriters shortly thereafter, before any repairs were made, that the vessel was uninsurable in that condition, the petitioner put the boat up in dry dock. Early in 1945 she had the vessel appraised by an expert, who informed her that the cost of necessary repairs was considerably in excess of the sum paid her by the Coast Guard; whereupon she promptly sold the vessel for $4,250.

She now claims a casualty deduction for the year 1945 in the sum of $3,448.61, being the difference between the value of the vessel when it was loaned to the Coast Guard ($10,000) and the aggregate of the sum received from the Coast Guard and the sale price.

The respondent disallowed the deduction and proposed a deficiency for 1945 on two grounds: (1) the casualty deduction, if proper at all, should have been claimed in 1944; (2) petitioner's loss was not in the nature of a casualty. The Tax Court denied the deduction on the first ground without reaching the second ground; and the Court of Appeals, by judgment entered December 1, 1952, affirmed the decision of the Tax Court on the opinion of the lower court.

Summary of Facts.

These are the relevant facts, as found by the Tax Court (R. 60-63), on full stipulation of the parties (R. 15-17):

On or about May 1, 1941, and at a cost of $12,500, the petitioner acquired a trunk cabin cruiser named the *Silver King II.*

On April 1, 1942, the petitioner, "in accordance with the provisions" of Regulations, United States Coast Guard Auxiliary, offered the use of the vessel to the United States Coast Guard for a period of one year or for the duration of the emergency if longer, stating that the then estimated value of the vessel was $10,000. On April 11, 1942, and after an inspection of the vessel whose condition was found to be good, the Coast Guard accepted the offer of the petitioner. Thereafter the vessel was enrolled in the Coast Guard and employed by it for war purposes in accordance with the regulations mentioned.

The vessel, after having been armed, was assigned for coastal picket patrol and performed this as well as general duty in waters adjacent to and outside the port of Miami, Florida.

On July 10, 1944, the District Coast Guard Officer of the Seventh Naval District designated a special board of survey to convene without delay, to determine what repairs, if any, were necessary to place petitioner's vessel in a satisfactory condition for return to the petitioner, together with the estimated cost of such work and to make report thereon. The board of survey was to contact the petitioner or her representative and endeavor to arrange for a settlement on a cash basis. It was specifically directed that consideration "be given to the value of improvements made by the Government, as well as to any decrease in value caused by Government use." The board was also directed that if differences should arise between it and the petitioner which could not be reconciled, then the board would make its recommendations and have the petitioner reduce her claim to writing and submit such claim with the board's report, but if the board and the petitioner should be in agreement as to the amount of the settlement, a statement to that effect, in writing over the

petitioner's signature, should be included in the board's report.

On July 12, 1944, the board of survey convened and inspected petitioner's vessel. It found that no improvements had been made by the Government to the vessel after it was enrolled in the Coast Guard. After considering its findings in conference with the petitioner's agent or representative the board estimated at $2,301.33 the repairs necessary to place the vessel in a satisfactory condition for return to the petitioner. On the same day, July 12, 1944, the board made its report recommending that $2,301.33 be paid to the petitioner and the petitioner agreed in writing to settlement in that amount, which was paid to her on said day.

On or about July 14, 1944, the vessel was laid up from active patrol and general duty service and returned to the petitioner.

After the vessel was returned to the petitioner, and so far as shown, before any of the repairs found necessary by the Board of survey were made, insurance underwriters on July 31, 1944, determined that the vessel was not seaworthy and refused to insure it against marine risks.

On March 12, 1945, Edwin P. LeMay, a marine surveyor, appraiser and claim adjuster, of Miami, Florida, was retained by the petitioner to make an independent estimate of necessary repairs to restore the vessel to yachting condition. Concluding that the vessel had seen "tough service" and that it was in a leaking and unseaworthy condition, he valued it at $3,000 and estimated that an expenditure of at least $7,500 would be required to repair it and install new equipment. In arriving at the foregoing amounts, it was his opinion that the estimated cost of putting the vessel "in a satisfactory condition for return to the owner," which he regarded as the test employed by the Coast Guard in the case of vessels of this type, was not the same as the cost of restoring the vessel

to the same yachting condition it was in when turned over to the Coast Guard; that a vessel may be made seaworthy at less cost than required to put it in shape as a yacht; and that the estimates of cost made by the board of survey with respect to the petitioner's vessel were substantially less than the amounts required to make it seaworthy and must have been based on rates of labor far below those prevailing in the Miami area during 1944 and 1945.

On or about March 1, 1945, the petitioner sold the vessel for $4,250.

In her income tax return for 1945, the petitioner took a deduction for the casualty loss sustained in that year on the *Silver King II*. The petitioner claims $3,448.67 as the amount of the loss, that amount being the $10,000 at which she valued the vessel at the time it was taken over by the Coast Guard, reduced by the $2,301.33 received in 1944, in settlement of her claim against the Coast Guard, and the $4,250 received by her in 1945 upon the sale of the vessel. In determining the deficiency, the respondent disallowed the deduction in full.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code. Judgment was entered herein by the Court of Appeals on December 1, 1952 (R.). Petition for rehearing was not filed.

Opinions Below.

The memorandum opinion of the Tax Court, printed in full in the Record (R. 60-66), is reported at C. C. H. Dec. 18,881, P-H Par. 52,090. The per curiam opinion of the Court of Appeals is reported at 199 F. 2d 958.

Specification of Error to Be Urged.

The Court of Appeals, in affirming the decision of the Tax Court on the opinion below, adopted an erroneous

rule of law requiring deduction for a casualty loss to be taken in every case in the year of the occurrence of the physical event giving rise to the loss, rather than permitting the deduction in the year the taxpayer was able to ascertain the amount of the loss with reasonable accuracy.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is probably in conflict with the decision of the Supreme Court in *Alison* v. *United States*, ... U. S. .... (decided December 8, 1952), as to when a loss is "sustained" for the purposes of Section 23(e) of the Internal Revenue Code.

2. The specific question decided below, as to the time of deducting a casualty loss under Section 23 (e), is a fundamental question of tax law which has been not, but should be, settled by this Court, particularly inasmuch as the decision of the Court of Appeals represents a gross departure from the rule applied by lower courts in other cases.

3. A decision by this Court on this question can have a salutary effect in clarifying the rules for administering the annual accounting system on which our tax laws are based, and in diminishing tax controversies over the timing of deductions.

Wherefore it is respectfully requested that this honorable Court issue a writ of certiorari to the Court of Appeals for the Second Circuit.

Respectfully submitted,

MARK H. JOHNSON,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

IONE S. WYNNE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Introductory Statement.

The nature of this action and the principal facts have been outlined in the petition and require no restatement.

Specification of Error to Be Urged.

The Court of Appeals, in affirming the decision of the Tax Court on the opinion below, adopted an erroneous rule of law requiring deduction for a casualty loss to be taken in every case in the year of the occurrence of the physical event giving rise to the loss, rather than permitting the deduction in the year the taxpayer was able to ascertain the amount of the loss with reasonable accuracy.

Argument.

The timing of a loss deduction under Section 23(e) of the Internal Revenue Code has recently received the attention of this Court in the case of *Alison* v. *United States of America,* decided December 8, 1952. The decision in that case followed the decision of the Court of Appeals in the instant proceeding by one week; and it is possible that had the timing of the two decisions been reversed, this petition might not have been necessary, so alike is the question on which the two cases turn, namely: whether a loss is necessarily "sustained" when the physical event causing the loss occurs, so that a deduction not then claimed is forever lost to the taxpayer.

Questions of this sort are one more unfortunate product of our annual accounting system, requiring tax liability to be computed on the basis of annual returns showing the net result of all transactions during a fixed accounting period. The more notorious consequences of this system that measures the flow of income by arbitrary periods of twelve months' duration, as though the transactions for each year were separate and apart, with resultant violence to the realities of the business cycle, and penalties for taxpayers (corporate and individual) with fluctuating incomes, have led to some statutory modification of the annual accounting rules: witness, the loss carry-over provisions of Section 122, and the long-term compensation rules in Section 107.

Just as the rigidity of an annual accounting system makes for serious injustice to taxpayers, so there inheres in the system incentives for taxpayers' attempts at shifting income and deductions, sometimes to achieve self-averaging, just as often to effect avoidance. These weaknesses in the system have also brought forth corrective legislation, often complex and inelegant, such as the penalty surtaxes on accumulated surplus (§102) and

on personal holding companies (§§331, ff. 500 ff.), the restrictive basis adjustment rules for depreciation (113[b][1][B]), and the loss disallowance rules in cases of intra-family sales (§24[b]) and wash sales (§118).

Standing between the extremes of inevitable injustice to taxpayers and flagrant abuse *by* taxpayers is the case of the unwary taxpayer, innocent of tax avoidance intent, who, caught in the mesh of the annual accounting rules, loses the opportunity to claim a tax deduction which is rightfully his. It is here that the petitioner in our case finds herself. She is in company with such similarly situated unfortunates as the lender who failed to see the worthlessness of his debtor in time, the too-optimistic investor who did not read the signs of business decay astutely, the business executive who trusted an employee until it was too late either to recover the stolen funds or to claim the solace of a tax loss.

It is in cases such as these that the public is treated to the undignified spectacle of the taxpayer and his Government engaged in acrimonious dispute over hard and often impossible questions as to year of loss, the solution of which in any given case provides no guidance for any later case. This is the inevitable consequence of an inexorable system that tolerates loss deductions only at one certain instant in time, though the "facts" of loss, or the means of measuring the loss, cannot then be divined. It was in part his impatience with rules that demanded a precise and final reckoning within a particular fiscal period as to matters that at times could not then be even provisionally determined that led Professor Henry Simons to make his radical suggestions for income tax reform:

> "Not being authorized to give away government property, the Treasury naturally wastes a lot of its and taxpayers' time seeking to assure that taxpayers do not 'unlawfully' allocate losses to periods

> where they are useful (where the marginal tax-rate is high) instead of to periods in which they 'actually occurred.' Again, this means deliberate aggravation of penalties on mere fluctuation of annual income—and litigation which is even worse in kind than in amount. It is the antithesis of taxpayer freedom in the use of their bases. A balanced, integrated realization procedure and some kind of averaging are indispensable, if only to preclude bitter controversy over the essentially metaphysical 'questions of fact' here involved, and to put an end to preposterous legal ceremonies, reminiscent of trials for heresy or witchcraft, for 'settling' such questions." Simons, Federal Tax Reform (1950), 101-102.

A milder palliative is available than the effective abolition of annual accounting rules that Professor Simons has proposed. This Court in the *Alison* case has decided that the disciplines of the annual accounting system do not require an inflexible rule for the timing of loss deductions that would make them available only in the year of occurrence of the physical events that have given rise to the loss.

> "Whether and when a deductible loss results from an embezzlement is a factual question, a practical one to be decided according to surrounding circumstances (Citation omitted). An inflexible rule is not needed; the statute does not compel it. For years the Treasury has administered the tax law under regulations saying that deductions shall 'ordinarily' be taken in the year of embezzlement. Ordinarily does not mean always."

While *Alison* was an embezzlement case, and ours is a casualty case, the considerations that induced a relaxed

but more realistic rule of realization there are present in full measure in casualty cases. The same section of the Code (I. R. C. §23[e]) is of course controlling in both cases. Even the Regulations are very similar. Compare Reg. 111, Sec. 29.23(e)-1 with Reg. 111, Sec. 29.43-2.

By way of justification of a rule which would permit taxpayers to deduct embezzlement losses in years subsequent to the thefts, this Court noted:

> "Taxpayers are usually well aware of all the circumstances of financial losses for which tax deductions are allowed. Not so when a trusted adviser or employee steals."

Similarly, the victim of a casualty does not always possess knowledge in the year of the casualty of all the factors affecting his casualty deduction, particularly the matter of the dollar amount of the loss. In claiming a tax deduction for a loss, a taxpayer must be as fully aware of its amount as he is of the circumstances giving rise to the deduction. Otherwise, he may be compelled to claim a deduction in an arbitrary amount where he has insufficient facts on which to base an intelligent estimate. It is not difficult to imagine the Commissioner claiming in such circumstances that the deduction is premature.

Of course, a taxpayer cannot be permitted to sleep on his deduction, and wait before making his investigation of his loss until the year in which he can derive the greatest benefit from the deduction. But such leeway is not implicit in a rule, such as we advocate here, that would give the taxpayer full opportunity to ascertain the amount of his loss with reasonable accuracy before claiming his deduction. To give the taxpayer this freedom has ample precedent in analogous instances where the reporting of income (*e. g. Luckenbach Steamship Co.*, 9 T. C. 662)

or deduction (*e. g., Capital Warehouse Co.,* 9 T. C. 966, aff'd 171 F. [2d] 395; *Ralph Patsch,* 19 T. C. #28), may, in fact, *must* await ascertainment of the amount with a reasonable degree of certainty, and involves neither abuse of the annual accounting rules nor danger to the revenues, so long as there is no "evidence or suggestion that the tax year in issue was selected by petitioner because of an unusual tax advantage to be gained at that time rather than for bona fide reasons". (The quoted language is from an opinion of Judge Opper dealing with the analogous problem of the year of deduction for worthless stock, *M. Thompson,* BTA Memo. C. C. H. 12,144-A, P-H Par. 41,457.)

This Court noted in the *Alison* case:

> "Furthermore, the terms embezzlement and loss are not synonymous."

The lack of identity between these two terms derives from uncertainty whether the loss will be restored; the theft occurs, but whether there will be loss is then unknown. In casualty cases, too, the terms "casualty" and "loss" are not synonymous, because "loss" in a casualty case is a mathematical conclusion, determinable only by a comparison between the value of the property immediately before the casualty and its value immediately after. *Helvering* v. *Owens,* 305 U. S. 468; I. T. 4032, Cum. Bul. 1950-2, 21. Thus, the casualty occurs, but whether or not there will be loss must await a determination of the resultant decline in value of the property. Therefore, the taxpayer may not have a loss, or at any rate may well not know he has a loss, even though he is fully aware of the casualty.

That, in fact, is the circumstance in the instant proceeding. The Coast Guard board of survey convened and fixed $2300 as the value of the repairs necessary to place the taxpayer's vessel in a satisfactory condition for return

to her. That same day, July 12, 1944, the taxpayer agreed to the amount fixed by the Coast Guard and accepted immediate payment. Two days later the yacht was returned by the Coast Guard. To this point she had no knowledge of her loss, and in fact, may well have been lulled into believing the Coast Guard settlement had made her whole. She thereafter immediately took steps to restore the yacht to personal service, and to this end contacted insurance underwriters who, two weeks after the Coast Guard had released the boat, advised the taxpayer that the vessel was unseaworthy and refused to insure it against marine risks. Inasmuch as the repairs reported by the Coast Guard as being necessary had not yet been undertaken, this determination by the underwriters was not cause for the taxpayer to suspect that she had a loss above what the Coast Guard paid her. She then put the boat up in dry dock. Subsequently, early in 1945, the taxpayer retained a marine expert to place a value on the vessel and to estimate the cost of restoring it to yachting condition.

Only when this expert reported a value of $3,000 for the vessel, against a value of $10,000 when the boat had been turned over to the Coast Guard, and estimated the necessary repairs at $7,500, did the taxpayer have possession of facts sufficient to apprise her of her loss. Convincing confirmation of these facts came almost immediately when she sold the vessel for $4,250. Incidentally, the disparity between the appraisal of the taxpayer's expert and the sale price lends force to the taxpayer's contention that the determination of loss in cases of casualty should await the occurrence of events fixing the amount of the loss with reasonable accuracy. In the long run, the Treasury will come off better with such a rule than one that invites the taxpayer to buy a favorable appraisal. Not every case, of course, will present the fortuitous circumstance of an arm's-length sale close on the heels of a casualty; but at least a practical rule, such as this Court

laid down in the *Alison* case, would not deny to the taxpayer or the Treasury the opportunity of taking advantage of such a circumstance where it is present.

The error of the Tax Court and the Circuit Court below, like the error of the lower courts in the *Alison* case, was in applying the rule that a loss is inevitably "sustained" at the very time the physical event of casualty or embezzlement occurs. Thus, the opinion of the Tax Court, which the Circuit Court adopted, says:

> "It thus appears that, *de facto,* the loss, whatever the amount, had been sustained at or prior to that time [return of the vessel by the Coast Guard]. Having been sustained, it was deductible to the extent 'not compensated for by insurance or otherwise.' * * * Section 23(e)(3) makes no provision for deduction in one year of losses sustained in another year."

The only exception which the Tax Court would allow to operate on this rule is for "compensated" losses, which it admits are not deductible until the liability for compensation is settled. The lower court then mistakenly treats this as a case of "compensated" loss, viewing the Coast Guard payment as the equivalent of compensation; and, such payment having been settled on in 1944, the Court rules the loss deduction to have accrued in 1944. Lest this Court be tempted to accept the analysis of the Tax Court on this point, we feel compelled to briefly point out elements which distinguish this settlement with the Coast Guard from the settlement of a typical compensation claim: (1) the compensation which the taxpayer, as a patriotic citizen who voluntarily gave the use of her vessel to the Coast Guard in wartime without any charge therefor, was willing to accept from her Government for necessary repairs on the return of the vessel cannot be compared

with the compensation that would have been demanded under other circumstances; (2) the proceedings by which the Coast Guard board of survey fixed the amount to be paid to the taxpayer were not contested; (3) the standard of compensation employed by the Coast Guard, "satisfactory condition for return to owner", is not the standard that would operate in the regular case of a claim for loss. Thus, while the settlement of a typical compensation claim would normally involve determination of the amount of loss of the injured party, and so afford an appropriate occasion for that party to claim a deduction for his loss to the extent it goes uncompensated, the settlement of this taxpayer with the Coast Guard in no way went into the matter of the taxpayer's loss.

The respondent argued below that the taxpayer nevertheless had an *opportunity,* when the Coast Guard recognized and offered a cash settlement, of determining the full extent of the damages sustained by the wartime usage of the vessel. Let us assume that this is so. The fact is that she did not then make such a determination, and the facts recited at pages 12-13 above further show that her failure to do so was not prompted by bad faith. What legitimate interest of the Treasury is served by borrowing from the common law the principle that imputes to a tortfeasor knowledge of things he could, or at least should, have known? It is submitted that when the year in which a taxpayer claims his loss provides events which furnish the first satisfactory occasion for ascertaining the amount of his loss, there is no warrant in the Code, or the Regulations, or the commands of the annual accounting system generally, for denying the taxpayer his deduction on the ground that it could have been taken in an earlier year, absent evidence, of course, that those events were deliberately "planted" in the later year to serve the end of tax avoidance.

That is the teaching of the *Alison* case, as we read it. Foursquare support for the principles which the petitioner will ask this Court to affirm, if it grants certiorari here, is found in *Pike County Coal Corporation,* 4 BTA 625, where the taxpayer's machinery was damaged by fire in 1918, but taxpayer could not ascertain the extent of damage save by having the machinery repaired by the manufacturer. In sustaining a casualty deduction in 1919, the Board said:

> "The statute contemplates that a deduction shall be allowed when a loss has in fact and in truth been sustained, and the establishment of the loss is a question of fact in each case and may not always depend upon the happening of any particular event. In order to have been in a position to claim a deduction in 1918, the taxpayer would have been required to justify, with at least some degree of accuracy, the amount of the loss; otherwise the deduction from gross income for 1918 would have represented a mere guess, in all probability, unjust either to the Government or to itself. It is evident, therefore, that whatever amount the petitioner might have computed, with no more information than it had, would have been conjectural, because it was not in possession of information necessary to enable it to make such computation."

To the same effect, see *Barret* v. *United States,* 102 F. Supp. 956 (D. C. W. D. La.), reh. den. 103 F. Supp. 730, app. pend. on other issue CA 5.

Conclusion.

Because the decision of the Court of Appeals is probably in conflict with this Court's recent decision in the *Alison* case, and in any event decides a question of wide importance in the administration of the tax laws, and be-

cause a decision by this Court can have the effect of diminishing to a considerable extent litigation concerning the application of the annual accounting rules generally, it is respectfully requested that a writ of certiorari be issued to the Court of Appeals for the Second Circuit.

It should be noted that if certiorari is granted, and if this Court then decides the issue raised by this petition in favor of the petitioner, it will doubtless be necessary to remand this case to the Second Circuit for decision on the question whether the loss suffered by the petitioner is in the nature of a casualty loss. On briefs below the petitioner claimed that the casualty section embraces a loss resulting from abnormal and heavy usage to which her vessel was subjected by the Coast Guard in the course of prosecution of the recent war; but the lower courts did not reach this point in view of their holding that the petitioner had in any event claimed the loss in the wrong year.

Respectfully submitted,

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BRIEF

FOR THE

RESPONDENTS

IN

OPPOSITION

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In the Supreme Court of the United States

No. 626

IONE S. WYNNE, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 60-66) is not reported. The opinion of the Court of Appeals (R. 79) is reported at 199 F. 2d 958.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1952. (R. 80) The petition for a writ of certiorari was filed on February 27, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether petitioner sustained a deductible loss during the taxable year 1945 under Section 23(e)(3) of the Internal Revenue Code on account of alleged casualty damage claimed to have been suffered by her vessel while it was used in the Coast Guard service, the cause of the alleged damage having ceased and the amount thereof having become readily determinable at the time the vessel was returned to her in July 1944, at which time she accepted from the Government a sum to cover the repairs necessary to place the vessel in a satisfactory condition for return to her.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * *

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at

the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (e)-1. *Losses by Individuals.* —Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft, and a deduction therefor has not prior to the filing of the return been claimed for estate tax purposes in the estate tax return * * *.

* * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any sal-

vage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113 (b). For special provision with respect to war losses, see section 127.

* * * * *

STATEMENT

The facts, as stipulated by the parties and as found by the Tax Court, may be summarized as follows:

On April 11, 1942, the United States Coast Guard accepted the offer of petitioner, the taxpayer, who was a member of the Coast Guard Auxiliary, to use her pleasure yacht, a forty-six foot cabin cruiser, for the duration of the emergency. The vessel had been previously inspected by the Coast Guard and found to be in good condition. It had been purchased the previous year by the taxpayer at a cost of $12,500 and in her offer to the Coast Guard she placed its value at $10,000. (R. 60.) On September 26, 1942, the Coast Guard estimated its value to be $8,000. (R. 61.)

The yacht was returned to the taxpayer on July 14, 1944, after having been used for two years by the Coast Guard for coastal patrol in the waters outside Miami, Florida. (R. 62.) Preliminary thereto, a special board of survey was convened by the Coast Guard for the purpose of determining what repairs were necessary to place the vessel in a "satisfactory condition for return to the owner,

together with the estimated cost of such work". (R. 27-28, 61.) The directive convening the board contained instructions as to the procedure to be followed in the event that differences between the board and the owner made a cash settlement impossible. (R. 28, 61.) The board estimated the cost of the needed repairs to be $2,301.33. (R. 28-41, 62.) The taxpayer agreed in writing to settlement in that amount, which was paid her on July 12, 1944. (R. 29, 62.)

On July 31, 1944, after the vessel was returned to the owner, she was refused marine insurance on it as unseaworthy. (R. 62.) She sold it on March 1, 1945, for $4,250. (R. 62.)

Subsequently, on March 12, 1945, she employed an expert marine appraiser to inspect the vessel. He estimated the value of the vessel to be $3,000, and the cost of putting it into yachting condition to be $7,500. (R. 62.)

In her income tax return for 1945, the taxpayer took a deduction of $5,117.50 as a casualty loss. This deduction was disallowed by the Commissioner. Before the Tax Court, this claim was by taxpayer reduced to $3,448.67, the difference between $10,000, the value at which taxpayer valued the vessel when it was turned over to the Coast Guard, and the $2,301.33 received from the Coast Guard in 1944, in settlement of the claim against the Coast Guard, plus the $4,250 realized on its sale in 1945. (R. 63.)

The Tax Court determined that taxpayer's loss was suffered in 1944. It found that (R. 65)—

> As far as the vessel itself was concerned, the damage to it occurred during the period of its use by the Coast Guard and was complete on or before July 14, 1944, when the vessel was laid up from active patrol and returned to the petitioner.

It found further that her right to compensation from the Coast Guard was fixed, determined and concluded by an agreement in July, 1944, pursuant to which she received $2,301.33 in full satisfaction of her claim. It concluded that as of that date her transaction with the Government "was completed and finally closed" and, if any loss was ever sustained by the taxpayer in excess of the amount for which she was compensated, "that loss had been sustained by that time and, if deductible at all, was then deductible". (R. 65.) Hence, the Tax Court found it unnecessary to determine whether or not taxpayer's loss was due to a casualty. (R. 66.) The Court of Appeals for the Second Circuit affirmed, *per curiam*, on the opinion below. (R. 79.)

ARGUMENT

1. The only question presented by this case is whether taxpayer was permitted to take a deduction in 1945 under Section 23(e)(3) of the Internal Revenue Code for alleged "casualty" damage suffered by her vessel as a consequence of its use by

the Coast Guard between April, 1942, and July, 1944. Both courts below held that no loss was sustained by taxpayer in the taxable year 1945. Section 23(e)(3), *supra*, pp. 2-3, permits an individual in computing his income tax to deduct from gross income "losses sustained during the taxable year and not compensated for by insurance or otherwise" to property, not connected with trade or business arising "from fires, storms, shipwreck, or other casualty * * *."[1] We submit that the unambiguous statutory language, as applied to the undisputed facts in this case, permits no reasonable conclusion other than that reached by the courts below, that there was no loss in 1945.

The alleged casualty which gave rise to the loss in this case was the "abnormal and heavy usage" (R. 64) of the vessel by the Coast Guard between April, 1942, and July, 1944. This use terminated on or about July 14, 1944, when the vessel was returned to taxpayer. At that point the event alleged to have given rise to the loss came to an end, and assuming, without conceding, that the event was a "casualty", taxpayer had an immediate right, since the amount of the damage was then determinable, to the deduction allowed by Section 23(e)(3) for the loss suffered by her vessel during

[1] Taxpayer made no claim in the Tax Court that her alleged loss was sustained in a transaction entered into for profit within the meaning of Section 23(e)(2) of the Internal Revenue Code, and she specifically disavowed any claim that she was seeking to deduct any loss sustained by reason of the sale of her vessel in 1945. (R. 64.)

its use by the Coast Guard. In short, since the "casualty" came to an end in 1944 and there was nothing to prevent prompt ascertainment of the damage, the statute permitted the loss to be taken only in the year 1944. As this Court has said, "a loss, to be deductible under Section 23(e), must have been sustained *in fact* during the taxable year". *Boehm* v. *Commissioner,* 326 U. S. 287, 292, rehearing denied, 326 U. S. 811.

Taxpayer's reliance on the recent decision of this Court in *Alison* v. *United States,* 344 U. S. 167, as upholding her right to defer to 1945 deduction of the loss sustained in 1944, is misplaced. In that case, this Court held that whether and when a deductible loss results from an embezzlement is a factual question. It arrived at that conclusion because of the "special nature of the crime of embezzlement" whose "essence is secrecy" and because the possibility of replacement and recovery of embezzled money makes the loss not inevitable upon the theft. Here, no secrecy surrounded the event giving rise to the taxpayer's loss, i.e., the permitted use by the Coast Guard of her vessel, and no event subsequent to the so-called "casualty" could diminish or augment the amount of her loss which, as she concedes in her brief (p. 12), is the difference between the fair market value of her vessel immediately before and after its use by the Coast Guard. *Helvering* v. *Owens,* 305 U. S. 468; I. T. 4032, 1950-2 Cum. Bull. 21. Consequently, this Court's decision in the *Alison* case is not relevant here. Likewise inap-

posite are two decisions cited by the taxpayer (Br. 16), in which the courts permitted the losses to be deducted in later years than the happening of the events causing them, upon the theory that establishment of the amounts of the losses depended upon subsequent developments. *Barret* v. *United States,* 102 F. Supp. 956 (W.D. La.), now pending on the Government's appeal in the Court of Appeals for the Fifth Circuit; *Pike County Coal Corp.* v. *Commissioner,* 4 B.T.A. 625.[2]

The soundness of those decisions is highly doubtful, in view of the statutory provision permitting losses to be taken only in the taxable year sustained. In any event, it is clear that taxpayer could not be aided by the passage of time in ascertaining the amount of her loss. That loss could be definitely fixed by a determination of the fair market value of her vessel on July 14, 1944. All that remained for her to do was to ascertain that value, and the ascertainment of that fact was not contingent in any way upon the happening of a subsequent event. Moreover, taxpayer had a period of approximately

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[2] In the *Barrett* case, the district court held that taxpayer might deduct in 1946 a loss sustained in late December, 1944, on account of damage caused to his trees by a storm and freeze, upon the theory that the damages could not have been ascertained earlier than 1946. In the *Pike* case, the Board of Tax Appeals (now the Tax Court) held that taxpayer could deduct in 1919 losses sustained on account of damage by fire to its mining machinery in 1918, where the amount of damage could not be ascertained until the machinery had been returned to the manufacturer for repairs.

five and one-half months in 1944 to make the determination. To the extent, if any, that the difference between the market value of her vessel before and after its use by the Coast Guard exceeded the amount received by her from the Government on July 12, 1944, she had sustained a loss "not compensated for by insurance or otherwise" as of July 14, 1944. (R. 66.) As of that date, her transaction with the Government "was completed and finally closed", and any loss sustained, which could have been readily measured and computed, "if deductible at all, was then deductible". (R. 65.) It was not until March, 1945, that her expert made his appraisal of the vessel.

The sale on March 1, 1945, was not the identifiable event which fixed taxpayer's loss. As pointed out by the Tax Court, the sale was an event quite independent of the loss (R. 66). On that sale the taxpayer may have received more or less than the fair market value of her vessel eight months earlier, depending upon the intervening fluctuations of the market and the necessities of the particular buyer. And the gain or loss sustained on a sale made long after the occurrence of a casualty is irrelevant in determining a loss due to the casualty. As this Court has said: "The statute obviously does not contemplate and the regulations (Art. 144) forbid the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer. * * * But with equal certainty they do con-

template the deduction from gross income of losses, which are fixed by identifiable events * * * ." *United States* v. *White Dental Co.*, 274 U. S. 398, 401. The identifiable event which fixed the taxpayer's loss was the return of the vessel by the Coast Guard in July, 1944. To permit the taxpayer to defer the deduction of her loss until a subsequent year on the basis of a delayed appraisal, or sale of the vessel, would clearly permit the loss to be taken, not when sustained, but when it would suit the taxpayer's purpose to claim it.

2. Although neither court below passed upon the point, it is patent that any loss sustained by the taxpayer in connection with the use of her yacht by the Coast Guard was not deductible as a loss arising from a "casualty" within the meaning of that term as used in Section 23(e)(3). The statute permits deduction of losses arising "from fires, storms, shipwreck, or other casualty". Both by common definition and in context the term "casualty" means some sudden unforeseen occurrence similar to a fire, storm, or shipwreck. Here the damage to the taxpayer's yacht was not the result of any sudden, unforeseen accident but was the predictable consequence of its conversion to a patrol vessel and its use as such for a period of two years. Nor is it material that it was used in this way because of a war. Otherwise, every railroad that was forced to subject its equipment to unusually heavy service without being able to make

necessary repairs during the emergency, every homeowner who could not repaint his house because of wartime paint shortages, and anyone else who saw his property deteriorate more quickly because of wartime conditions could claim a casualty loss.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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